

U.S. DISTRICT COURT
DISTRICT OF NEVADA
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-01-0700-DWH (VPC)

ORDER

MICHAEL J. CONLON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Before the court is defendant's renewed motion to dismiss or in the alternative for summary judgment (#44/#62). Plaintiff has opposed (#75), and defendant has replied (#76).

I. Factual Background¹

On August 8, 1986, Michael J. Conlon ("plaintiff" or "Conlon") was sentenced by the United States District Court for the Western District of Texas to 12 years in prison with a special parole term of eight years to run consecutively to the term of imprisonment. (Def.'s Statement of Undisputed Material Facts (#43), Ex. 12 at 1.) Conlon was released on regular parole in May of 1990, with the term to expire on January 28, 1998, at which time his special parole was to begin. (*Id.*) On February 12, 1998, the United States Parole Commission issued a warrant for Conlon's

¹The factual background section was taken in large part from the two orders of Judge William D. Browning, Senior Judge for the United States District Court for the District of Arizona, dated November 29, 1999 and August 24, 2001, granting plaintiff's habeas petitions. (See Def.'s Statement of Undisputed Material Facts (#43), Exs. 12, 23.)

1 arrest based on allegations that he had left his **last known** residence in Las Vegas and failed to advise
2 his probation officer of his current address. (*Id.* at 1-2.) He was then arrested on the outstanding
3 warrant on February 19, 1998. (*Id.* at 2.) On **March 26**, 1998, a special parole revocation hearing
4 was held at which Conlon admitted having **failed to report** his change of residence. (*Id.*) As a result,
5 the Parole Commission revoked his parole and **converted** his eight year special parole term to a
6 regular term of imprisonment of 24 months. (*Id.*)

7 In July of 1998, Conlon appealed the **revocation** of his special parole term to the National
8 Appeals Board, arguing that the Parole Commission **lacked** the authority to issue a warrant for
9 violations of his special parole during his **regular parole** term. (*Id.*) The National Appeals Board
10 affirmed the Commission's decision on **October 15**, 1998, stating that Conlon's failure to report to
11 his probation officer was a violation of his **special parole**. (*Id.*) After exhausting his administrative
12 remedies, Conlon filed a petition for writ of **habeas corpus** pursuant to 28 U.S.C. § 2241 with the
13 United States District Court for the District of **Arizona** on July 27, 1998. (*Id.*) On February 19,
14 1999, he filed an amended petition alleging **that he was** being illegally held in violation of his right
15 to due process because his parole violation, **which** occurred prior to the January 28, 1998
16 commencement of his special parole term, **tolled** the running of the regular parole term from the time
17 he absconded until the time of his arrest on **February 19**, 1998, meaning his special parole term never
18 commenced and the Parole Commission **never had** jurisdiction to revoke his special parole term.
19 (*Id.*)

20 Agreeing with Conlon that the Parole Commission never had jurisdiction to issue the warrant
21 to revoke his special parole, the court granted **his** petition for writ of habeas corpus on November 29,
22 1999 and ordered the Bureau of Prisons to **release him** on or before December 15, 1999. (*Id.* at 3.)
23 The order did not contain instructions **concerning** Conlon's duty to contact the Parole Commission
24 upon his release. (Def.'s Statement of Undisputed Material Facts (#43), Ex. 23 at 2.) At some point
25 in the spring of 2000, plaintiff again was **arrested**, this time by local police in Minnesota. (*Id.*) He
26 was transferred to the U.S. Marshals for **violating parole**, although no parole violation warrant had
27 been issued and no probable cause hearing **was held**. (*Id.*) Conlon then requested that his habeas
28 petition be reopened. (*Id.*) Following an **evidentiary** hearing, the court determined that because its

1 original order had not required Conlon to establish contact with the Parole Commission, nor had it
 2 specified whether he still had a term of probation to complete, Conlon's failure to report to the
 3 Parole Commission could not be deemed improper. (*Id.* at 4.) By order dated August 24, 2001, the
 4 court vacated Conlon's special parole term and ordered he be released no later than August 31, 2001.
 5 (*Id.*)

6 In July of 2001,² Conlon submitted an administrative claim to the United States Department
 7 of Justice. (Second Am. Compl. (#42), 5 at ¶ 28, and Exs. A, B.) He then commenced the current
 8 action by filing his complaint in *pro per* on December 14, 2001 with the United States District Court
 9 for the District of Nevada. (Compl. (#2).) On March 19, 2002, Conlon, through counsel, filed an
 10 amended complaint. (First Am. Compl. (#3/#4).) Conlon then sought leave to file a second
 11 amended complaint (#32), which was granted (#35). Conlon's second amended complaint (#42) was
 12 filed November 19, 2002. In response to the second amended complaint the defendants jointly filed
 13 for dismissal of the action, or in the alternative for summary judgment (#44). Before an opposition
 14 was filed, however, the parties stipulated (#53) to the dismissal of all defendants except the United
 15 States, and all claims except those arising under the Federal Tort Claims Act ("FTCA"). In
 16 approving the stipulation, the court disposed of defendants' motion to dismiss (#44). The United
 17 States now renews that motion (#62), arguing that Conlon's FTCA claims "are barred by the
 18 applicable statute of limitations, and even if not so barred, lack sufficient evidentiary support." (#62
 19 at 3.)

20 **II. Analysis**

21 **A. Subject Matter Jurisdiction**

22 Federal courts are courts of limited jurisdiction. Dismissal is appropriate when the district
 23 court lacks subject matter jurisdiction over the claim. *See* Fed. R. Civ. P. 12(b)(1). Accordingly,
 24 subject matter jurisdiction is a threshold issue which goes to the power of the court to hear the case.
 25 Lack of subject matter jurisdiction may be raised at any time and by any party. Additionally, the
 26

27 ²The complaint states that the administrative claim was filed on July 10, 1998. However, it is clear from
 28 the supporting documents that this is an error and that the administrative claim was actually filed in July of 2001.
 (See Second Am. Compl. (#42), Exs. A, B.)

1 court may *sua sponte* raise the issue of lack of **subject matter** jurisdiction and dismiss a case if no
 2 subject matter jurisdiction exists. Fed. R. Civ. P. 12(h).

3 By stipulation of the parties (#53), the only **claims** remaining in this action are those arising
 4 under the FTCA. As such, this court has jurisdiction over plaintiff's claims, if at all, pursuant to 28
 5 U.S.C. § 1346(b), which provides that federal district courts have exclusive jurisdiction over civil
 6 actions on claims against the United States, and the FTCA, 28 U.S.C. § 2671, *et seq.*, which sets
 7 forth the procedures for suing the United States. Accordingly, unless this court finds both that
 8 plaintiff's claims are cognizable under the FTCA, and that the procedural requirements of the FTCA
 9 have been satisfied as to those claims, the claims **must be** dismissed for lack of subject matter
 10 jurisdiction.

11 1. The Federal Tort Claims Act ("FTCA")

12 The FTCA provides a limited waiver of the United States's sovereign immunity, and allows
 13 private individuals to sue for money damages

14 for injury or loss of property, or personal injury or death caused by the negligent
 15 or wrongful act or omission of any **employee** of the Government while acting
 16 within the scope of his office or employment, under circumstances where the
 United States, if a private person, would be liable to the claimant in accordance
 with the law of the place where the act or omission occurred.

17 28 U.S.C. § 1346(b)(1); *see also* 28 U.S.C. § 2674 ("The United States shall be liable, respecting the
 18 provisions of this title relating to tort claims, in the same manner and to the same extent as a private
 19 individual under like circumstances, but shall not be liable for interest prior to judgment or for
 20 punitive damages.") In a FTCA action, "a court must apply the law the state courts would apply in
 21 the analogous tort action, including federal law." *Rhoden v. U.S.*, 55 F.3d 428, 431 (9th Cir. 1995)
 22 (holding that state court "would apply federal law to determine whether an arrest by a federal officer
 23 was legally justified and hence privileged."). The FTCA, however, does not provide a remedy
 24 against the United States for constitutional tort claims. *F.D.I.C. v. Meyer*, 510 U.S. 471, 477-78
 25 (1994) (rejecting due process claim asserted against federal agency under FTCA); *see also Delta*
 26 *Sav. Bank v. U.S.*, 265 F.3d 1017, 1024 (9th Cir. 2001) (holding that FTCA action must be premised
 27 on liability under state rather than federal law).

28 Moreover, the FTCA also contains a list of exceptions further narrowing the availability of

1 claims that may be asserted against the United States. 28 U.S.C. § 2680. "When a claim falls within
 2 a statutory exception to the FTCA's waiver of sovereign immunity, the court is without subject
 3 matter jurisdiction to hear the case." *Mundy v. U.S.*, 983 F.2d 950, 952 (9th Cir. 1993). One of
 4 these exceptions, commonly referred to as the intentional tort exception, bars "any claim arising out
 5 of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel,
 6 slander, misrepresentation, deceit or interference with contract rights." 28 U.S.C. § 2680(h). By its
 7 terms, however, the exception does not apply to the "acts or omissions of investigative or law
 8 enforcement officers." *Id.* The § 2680 exceptions "are interpreted according to federal law in order
 9 to avoid any dependence of federal subject matter jurisdiction upon state law." *Santiago-Ramirez v.*
 10 *Secretary of the Department of Defense*, 984 F.2d 16, 20 (1st Cir. 1993) (citing *U.S. v. Neustadt*, 366
 11 U.S. 696 (1961)). Moreover, "[i]n determining the applicability of the § 2680(h) exception, a court
 12 must look, not to the theory upon which the plaintiff elects to proceed, but rather to the substance of
 13 the claim which he asserts." *Low v. F.D.I.C.*, No. C 96-1958, 1996 WL 660613, at *3 (N.D. Cal.
 14 Nov. 7, 1996) (quoting *Lambertson v. U. S.*, 528 U.S. 441, 443 (2d Cir. 1976)).

15 Lastly, unless administrative exhaustion was first timely accomplished, subject matter
 16 jurisdiction will be found lacking over an otherwise viable FTCA claim. The FTCA provides, in
 17 relevant part, that

18 [a]n action shall not be instituted upon a claim against the United States for money
 19 damages for injury or loss of property or personal injury or death caused by the
 20 negligent or wrongful act or omission of any employee of the Government while
 21 acting within the scope of his office or employment, unless the claimant shall have
 first presented the claim to the appropriate Federal agency and his claim shall have
 been finally denied by the agency in writing and sent by certified or registered
 mail.

22 28 U.S.C. § 2675(a). Moreover, unless the claim is presented in writing to the appropriate Federal
 23 agency within two years after the claim accrues "or unless action is begun within six months after . .
 24 . notice of final denial of the claim by the agency to which it was presented," it "shall be forever
 25 barred." 28 U.S.C. § 2401(b). The date on which a claim accrues is determined by federal law.
 26 *Washington v. U.S.*, 769 F.2d 1436, 1438 (9th Cir. 1985) (citing *Pittman v. U. S.*, 341 F.2d 739 (9th
 27 Cir.), cert. denied, 382 U.S. 941 (1965)).

28 2. Application to Plaintiff's Claims for Relief

The United States has moved for dismissal of the remaining FTCA claims on the ground that plaintiff "did not file a timely administrative tort claim, a jurisdictional prerequisite under the FTCA." (Mot. to Dismiss (#44) at 17.) However, neither party has identified which of plaintiff's six causes of action constitute the remaining FTCA claims, nor, apparently, have they taken into consideration any of the exceptions to the FTCA's waiver of sovereign immunity. As such, the court will (1) identify which of plaintiff's claims are cognizable under the FTCA, (2) examine whether any of those claims fall into one of the exceptions to the FTCA's waiver of sovereign immunity, and finally, if any claims remain, (3) determine whether plaintiff timely filed an administrative claim with the appropriate federal agency.

a. Characterization of Plaintiff's Claims for Relief

Plaintiff's amended complaint alleges six claims for relief. The first claim, which does not specify a legal basis, encompasses several different allegations of wrongdoing. In relevant part, it alleges (1) that U. S. Probation Officer John Lawhead, "by and through the U.S. Probation Office made fraudulent and false allegations of special parole violations that were originally filed by the U.S. Parole Commission's case analyst" (Second Am. Compl. (#42), 8 at ¶ 56); (2) that the case analyst "elected to forward his/her stamp of approval to the Commissioner to issue a warrant for the Plaintiff's arrest even though the allegations were without jurisdiction" (*id.* at ¶ 57); (3) that plaintiff was then arrested on February 19, 1998 and "subjected to what was to be a preliminary hearing with an 'independent probation officer' to determine probable cause," but that "[t]he probation officer was predisposed to find the Plaintiff's guilt and ruled accordingly" (*id.* at ¶ 58); (4) that despite plaintiff's argument at the revocation hearing that the Commission lacked jurisdiction to violate the special parole term,³ "[t]he Examiner rejected the argument as 'weak,' and assessed the Plaintiff 24 months in prison" (*id.* at ¶¶ 60-63); and (5) that these acts were arbitrary and capricious, "so as to deny Plaintiff's liberty and property interests and rights without due process in violation of the First, Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution" (*id.* at ¶ 64).

³This argument was later sustained by the United States District Court for the District of Arizona in granting plaintiff's petition for habeas corpus. (November 29, 1999 order of Judge Browning, Def.'s Statement of Undisputed Material Facts (#45), Ex. 12.)

1 Plaintiff claims to have suffered personal injury, **wrongful** and false imprisonment, embarrassment,
 2 humiliation, and severe and extreme mental **anguish as a result**. Although not so titled, the court
 3 finds that this claim for relief alleges negligence **arising** out of the events resulting in plaintiff's
 4 February 19, 1998 arrest and subsequent imprisonment. To the extent that plaintiff also is alleging
 5 constitutional violations, this claim is not **cognizable under** the FTCA, *see F.D.I.C. v. Meyer*, 510
 6 U.S. 471, 477-78 (1994), and has been dismissed **by stipulation** of the parties (#53). To the extent
 7 this claim can be construed as alleging state law **causes** of action for negligence, false arrest, and
 8 false imprisonment arising out of plaintiff's February 19, 1998 arrest, it will be dealt with below.⁴

9 Plaintiff's second and third claims for **relief are** labeled "intentional infliction of emotional
 10 harm" and "negligence." (Second Am. Compl. (#42), 9-10.) Both are actionable claims under
 11 Nevada law and are therefore potentially viable **FTCA** claims against the United States. These
 12 claims, however, still are subject to the other **requirements** of the FTCA, including the exceptions to
 13 waiver of sovereign immunity and the **administrative exhaustion** requirement, which will be
 14 discussed below.

15 Plaintiff's fourth claim for relief is for "**false arrest.**" (*Id.* at 10.) While a cause of action for
 16 false arrest exists under Nevada law, plaintiff **appears** to be alleging only constitutional violations in
 17 this claim. Plaintiff asserts, in relevant part, that U.S. Probation Officers Patrick Foy, John
 18 Lawhead, and Thomas Collins "conspired to **violate** the Plaintiff's First, Fourth, Fifth, Sixth and
 19 Eighth Amendment rights." (*Id.* at ¶ 79.) The **underlying** factual allegations of this claim revolve
 20 around plaintiff's arrest following his release **from custody** pursuant to the granting of his first
 21 habeas corpus petition. Plaintiff claims that "Foy submitted a letter to the Commission with
 22 complete approval of Defendants Collins and Lawhead for the arrest of the Plaintiff for failure to
 23 report for supervision even though there was **no requirement** for supervision of plaintiff in Nevada."⁵
 24 (*Id.* at ¶ 81.) This false arrest "resulted in an **additional two months of illegal incarceration**" and

25
 26 ⁴"All pleadings shall be so construed as to **do substantial justice.**" Fed. R. Civ. P. 8(f).

27 ⁵Following his arrest on this warrant, plaintiff petitioned the United States District Court for the District
 28 of Arizona to re-open his habeas case. Judge **Browning** granted the petition and ordered plaintiff's immediate
 release on the grounds that his prior order had **not required** that plaintiff report for supervision. (*See* Def.'s
 Statement of Undisputed Material Facts (#45), Ex. 23.)

1 “was based upon the acts of false information, **misrepresentation**, negligence, as well as deliberate
 2 indifference to the Plaintiff.” (*Id.* at ¶¶ 82-83.) **To the extent** this claim for relief seeks redress for
 3 constitutional violations, it cannot be brought **under the FTCA**, *see Meyer*, 510 U.S. at 477-78, and is
 4 no longer at issue in this action pursuant to **stipulation** of the parties (#53). However, to the extent it
 5 can be characterized as a state law claim for **false arrest** or negligence arising out of his second
 6 unlawful incarceration, it will be dealt with below.

7 Plaintiff’s fifth claim for relief, entitled “**false imprisonment**,” also appears to allege only
 8 constitutional violations. (Second Am. Compl. (#42) at 11.) Plaintiff claims that “Warden Nancy
 9 Bailey acted individually and conspired with **Defendant’s** Inmate Systems Manager (name unknown)
 10 and Inmate Systems Manager (name unknown) to **violate** the Plaintiff’s First, Fourth, Fifth, Sixth
 11 and Eighth Amendment rights.” (*Id.* at ¶ 86.) He **further** asserts that he filed an “administrative
 12 remedy” with Warden Bailey, that Bailey **passed the action** to the Inmate Systems Manager who
 13 stated that the Commission could violate the **special parole** term, that Bailey approved the decision
 14 of the institution to not act upon the request, **and that** when plaintiff approached the “new” Inmate
 15 Systems Manager with the same information, **he received** the same negative response from Bailey.
 16 (*Id.* at ¶¶ 87-90.) Plaintiff claims he then **appealed** to the Regional Office, which affirmed the
 17 Warden’s actions, as well as to the Central Office, which also affirmed the Warden’s actions without
 18 investigation. (*Id.* at ¶¶ 91-92.) Although the **complaint** is unclear, it appears that these alleged
 19 incidents took place during plaintiff’s 24 month **incarceration** (of which he served 22 months) for the
 20 violation of his special parole term over which **the Commission** lacked jurisdiction. Again, to the
 21 extent that plaintiff is asserting constitutional **violations**, this claim is not cognizable under the
 22 FTCA, and was previously dismissed by **stipulation** of the parties (#53). However, to the extent
 23 plaintiff can be deemed to be asserting a state law **cause of action** for false imprisonment, it will be
 24 dealt with below.

25 Plaintiff’s sixth and final claim for relief is labeled “cruel and unusual punishment.” (Sec.
 26 Am. Compl. (#42) at 12.) Here plaintiff re-alleges that Warden Bailey acted individually and
 27 conspiratorially to violate plaintiff’s constitutional rights. (*Id.* at ¶ 95.) He further states that his
 28 false arrest “resulted in two extra months of **illegal incarceration**,” and that this “detention was based

1 upon the acts of false imprisonment, misrepresentation, negligence, as well as deliberate
 2 indifference.” (*Id.* at ¶¶ 96-97.) As previously stated, to the extent plaintiff is alleging constitutional
 3 violations in this claim for relief, they are not viable under the FTCA, and, in any case, were
 4 previously dismissed by stipulation of the parties (#53). To the extent this claim asserts state law
 5 causes of action for false imprisonment or negligence arising out of his second unlawful
 6 incarceration, it will be dealt with below.

7 Accordingly, the potential FTCA claims remaining after the parties’ stipulation to dismiss
 8 (#53) are for (1) false arrest, (2) false imprisonment, (3) intentional infliction of emotional harm, and
 9 (4) negligence. Based on the general factual allegations, it is clear that there are two separate
 10 incidents underlying these claims. The first incident encompasses the initial issuance of a warrant,
 11 arrest, and subsequent sentencing of plaintiff to 24 months in prison, actions over which the U.S.P.C.
 12 was later found not to have jurisdiction. The second incident consists of the issuance of a warrant,
 13 arrest, and subsequent two month incarceration following plaintiff’s release from prison after having
 14 been granted habeas relief from the 24 month sentence. As such, plaintiff has alleged two instances
 15 of false arrest, two instances of false imprisonment, two instances of intentional infliction of
 16 emotional harm, and two instances of negligence. This is not to say, however, that each of these
 17 claims will be actionable under the FTCA. Subject matter jurisdiction may still be lacking
 18 depending on the applicability of the FTCA’s exceptions to the waiver of sovereign immunity, and
 19 also on whether plaintiff timely completed the Act’s administrative prerequisites. These issues will
 20 be considered in turn.

21 b. Applicability of § 2680(h)’s Exceptions

22 Unless the acts or conduct giving rise to certain enumerated intentional torts, including false
 23 arrest and false imprisonment, were committed by investigative or law enforcement officers of the
 24 United States Government, those claims are barred by the intentional tort exception to the FTCA’s
 25 waiver of sovereign immunity. 28 U.S.C. §2680(h). The statute defines “investigative or law
 26 enforcement officer” as “any officer of the United States who is empowered by law to execute
 27 searches, seize evidence, or make arrests for violations of federal law.” *Id.* In other words, “[t]he
 28 FTCA . . . limits the United States’ liability to instances where wrongful acts by law enforcement

1 officers cause the unjustified imprisonment” or **arrest**. *Arnsberg v. U.S.*, 757 F.2d 971, 977 (9th Cir.
 2 1985). In deciding whether plaintiff’s claims **fall within** the § 2680(h) exception, the court must
 3 focus on the conduct upon which each of **plaintiff’s claims** is based, and not on plaintiff’s
 4 characterization of the causes of action. *Sheehan v. U.S.*, 896 F.2d 1168, 1171 (9th Cir. 1990).
 5 Section 2680(h) “bars suit for claims based on **conduct** which constitutes one of the excepted torts,
 6 and bars suit for no other claims.” *Id.*

7 This court has already determined that **plaintiff** pled causes of action in false arrest and false
 8 imprisonment, both of which clearly fall within § 2680(h). At issue, however, is whether these acts
 9 were committed by federal “investigative or law **enforcement** officers.” Plaintiff has alleged that
 10 these violations occurred based on the conduct of the U.S.P.C., various United States probation
 11 officers, and a prison warden. While an argument **can** be made that the U.S.P.C.’s commissioners
 12 could be regarded as “investigative or law **enforcement**” officials because they are empowered to
 13 make arrests, a similar argument applied to a **federal** magistrate judge was rejected by the Ninth
 14 Circuit. *See Arnsberg*, 757 F.2d at 978 n.5 (stating that “Congress intended § 2680(h) to apply only
 15 when the federal official acts in his or her **investigative** or law enforcement capacity” and that a
 16 judge “when acting adjudicatively does *not* act in an investigative or law enforcement capacity”).
 17 This court finds that the commissioners, in **issuing** warrants for plaintiff’s arrest and sentencing him
 18 to prison for parole violations, were acting **not in an** investigative or law enforcement capacity for
 19 purposes of § 2680(h), but rather in an **adjudicative** one. As for the warden, this court finds that she
 20 also was not acting in the capacity of an **investigative** or law enforcement officer. *See Puccini v.*
 21 *U.S.*, 978 F. Supp. 760, 761 (N.D. Ill. 1997) (**finding** that FTCA claims failed because “conduct
 22 complained of was that of persons acting as **prison administrators**, not investigative or law
 23 enforcement officers.”)

24 It is the alleged actions of the probation **officers** which raise the closest question. Although
 25 the Ninth Circuit has not yet addressed whether **probation** officers are considered investigative or
 26 law enforcement officers for purposes of § 2680(h), the Second Circuit has considered the issue. In
 27 *Wilson v. United States*, 959 F.2d 12 (2d Cir. 1992), the plaintiff brought suit alleging that the
 28 proceedings leading up to and resulting in the **revocation** of his parole constituted abuse of process,

1 malicious prosecution, and false imprisonment. *Id.* at 13. In determining whether the government
 2 officials involved in these actions were investigative or law enforcement officers, the court
 3 distinguished between the roles of probation and parole officers. After examining the statutory
 4 authority governing both probation and parole officers, the court concluded that in contrast to
 5 probation officers, parole officers are not vested with any of the law enforcement powers identified
 6 in § 2680(h) under the U.S.P.C.'s authorizing statute. *Id.* at 15 (*comparing* 18 U.S.C. §§ 4201 *et*
 7 *seq.* (probation) *with* 18 U.S.C. §§ 3601, *et seq.* (parole)). However, since the repeal of the parole
 8 statutes, Pub. L. No. 98-473, 98 Stat. 2027, 2031 (Oct. 12, 1984), the U.S.P.C. supervises inmates
 9 convicted before repeal by enlisting probation officers to perform the functions of parole officers.
 10 *Id.* (citing 18 U.S.C. § 4203(b)(4) and 18 U.S.C. §§ 3602, 3655). Accordingly, the court recognized
 11 that the powers of the two offices may rest in a single person and decided that "while the same
 12 person may be authorized to perform both functions, the officer is constrained by the statutes to
 13 differentiate between those powers, depending on the function being performed." *Id.* at 16.
 14 Specifically, the court held that "probation officers serving as parole officers cannot be considered
 15 investigative or law enforcement officers for purposes of the FTCA." *Id.*

16 This court finds the Second Circuit's analysis in *Wilson* persuasive. Accordingly, it must
 17 first be determined whether the officers plaintiff claims were responsible for his alleged false arrest
 18 and imprisonment were acting as probation officers or as parole officers. At first glance, it would
 19 appear that these officers in fact are probation officers. Not only does plaintiff refer to them in his
 20 pleadings as probation officers (*see generally* Second Am. Compl. (#42)), but the United States, in
 21 its Statement of Undisputed Material Facts (#45), actually includes affidavits from each officer
 22 stating that he is a United States probation officer, explaining his duties as such, and asserting that
 23 the allegations of the complaint arise entirely out of his official conduct as a probation officer. (*See*
 24 Def.'s Statement of Undisputed Material Facts (#45), Decls. of Kevin Lowry, Patrick Foy, and
 25 Thomas Collins.) However, in accordance with *Wilson*, the court must consider which hat the
 26 officers were wearing in their supervision of plaintiff, instead of relying on their titles alone. During
 27 the events giving rise to this action, plaintiff was not on probation, but rather on parole from a
 28 conviction entered prior to the repeal of the parole statutes. Because it was the U.S.P.C. attempting

1 to exercise jurisdiction over plaintiff, a parolee, **the officers** were not functioning as probation
 2 officers in this instance, but instead as parole **officers**. As such, these officers cannot be considered
 3 investigative or law enforcement officers for **purposes** of the FTCA. Because the conduct underlying
 4 plaintiff's false arrest and false imprisonment **was not** committed by investigative or law
 5 enforcement officers, these claims fall into § 2680(h)'s exception to the waiver of sovereign
 6 immunity. Accordingly, this court lacks **subject matter** jurisdiction over plaintiff's false arrest and
 7 false imprisonment claims, and they therefore **are dismissed**.

8 Plaintiff's intentional infliction of **emotional harm** and negligence claims may also be barred
 9 under § 2680(h) if they are found to "arise out of" plaintiff's false arrest and false imprisonment
 10 claims. The Ninth Circuit, in *Sheehan v. United States*, 896 F.2d 1168, 1172 (9th Cir. 1990), held
 11 that "a claim based on conduct constituting **the tort** of intentional infliction of emotional distress is
 12 not excluded as a matter of law from FTCA by § 2680(h)." However, because the court must focus
 13 its inquiry on the conduct upon which plaintiff's **claims** are based, and not on plaintiff's
 14 characterization of the causes of action, *id.* at 1171, the court must still determine whether the
 15 conduct underlying plaintiff's intentional infliction of emotional distress claim constitutes a false
 16 arrest or false imprisonment as those torts **are traditionally** defined. *See id.* The fact that there may
 17 be partial overlap with the barred torts "does **not support** the conclusion that if one is excepted under
 18 the Tort Claims Act, the other must be as well." *Id.* at 1170 (quoting *Block v. Neal*, 460 U.S. 289,
 19 298 (1983)). In *Sheehan*, the Ninth Circuit **remanded** the case to the district court to determine
 20 whether the plaintiff's claims would "permit **proof** of conduct that is not within the definition of any
 21 of the excluded torts," and that would "support [plaintiff's] claim she suffered injury from the
 22 intentional infliction of emotional distress **independently** of injury suffered from excluded conduct."
 23 *Id.* at 1173.

24 Here, plaintiff makes almost no **factual allegations** in support of his intentional infliction of
 25 emotional distress claim. Instead he refers **generally** to the "acts of Defendants" and states that they
 26 were intentional, malicious, oppressive, **extreme**, and outrageous, among others things, and that they
 27 resulted in his suffering various types of **emotional harm**, including diminished reputation,
 28 embarrassment, humiliation, and mental **anguish**. (Second Am. Compl. (#42) at 9.) The acts to

1 which he apparently is referring are those which **resulted** in his alleged unlawful arrest and
 2 imprisonment, and the emotional injury he **claims resulted** does not appear to have been suffered
 3 independently of the underlying false arrest and imprisonment. In fact, the entire claim appears to be
 4 designed as a vehicle for seeking punitive damages which, in any case, are not available under the
 5 FTCA. 28 U.S.C. § 2674. As such, this court **finds that** plaintiff's emotional distress claim "arises
 6 out of" his false arrest and false imprisonment **claims**, and is therefore also excluded under §
 7 2680(h).

8 Although plaintiff only has one claim for relief actually titled "negligence," and despite the
 9 fact that he failed to provide much in the way of **factual** allegations specifically supporting it, the
 10 remainder of his complaint contains sufficient **factual** allegations to support the existence of two
 11 separate negligence claims. For ease of analysis, the court will refer to them either collectively as
 12 plaintiff's negligence claims, or individually as **plaintiff's** first and second negligence claims. The
 13 first negligence claim arises out of the events **resulting** in plaintiff's February 19, 1998 arrest and
 14 subsequent imprisonment, while the second claim encompasses the conduct resulting in plaintiff's
 15 arrest and imprisonment following his release pursuant to the initial granting of his habeas petition.
 16 Although the result of these alleged acts of **negligence** was plaintiff's subsequent arrest and
 17 imprisonment on two separate occasions, those **arrests** and imprisonments were consequences of the
 18 acts underlying the negligence claim and not the conduct out of which the claim arose. *See Sheehan*,
 19 896 F.2d at 1170.⁶ Section 2680(h) excludes **only** claims based on conduct constituting one of the
 20 excepted torts and "bars suit for no other claims." *Id.* at 1171. Accordingly, plaintiff's negligence
 21 claim is not barred by § 2680(h)'s exceptions to the waiver of sovereign immunity.

22 c. Timeliness of Plaintiff's Administrative Claim

23 The United States has moved for dismissal of plaintiff's remaining FTCA claims on the
 24 ground that "Conlon did not file a timely administrative tort claim, a jurisdictional prerequisite under
 25

26 ⁶Moreover, a recent Ninth Circuit case discussed in detail below, while not addressing the issue of
 27 subject matter jurisdiction, does appear to support the exercise of jurisdiction over a claim for the negligent
 28 miscalculation of a prisoner's release date. *See Erlin v. U.S.*, 364 F.3d 1127 (9th Cir. 2004) (reversing lower
 court's dismissal as time-barred of former prisoner's FTCA action alleging Parole Commission's negligence in
 the miscalculation of his release date.).

1 the FTCA.” (Def.’s Mot. to Dismiss (#44) at 17.) The United States argues that Conlon’s FTCA
 2 claims accrued at the time of his false arrest on **February** 19, 1998, making his administrative claim,
 3 which was not filed until July of 2001, **untimely by more than a year and a half**. Furthermore, in
 4 anticipation of a continuing violation argument, **the** United States also contends that the allegedly
 5 tortious act was completed at the time of the **arrest**, and plaintiff’s wrongful imprisonment therefore
 6 was a continuing ill effect, and not a continuing **tort**. (*Id.* at 18.) In support, the United States cites
 7 to a Third Circuit case rejecting the notion **that a continuing incarceration is a continuing tort**. (*Id.*,
 8 citing *Sandutch v. Muroski*, 684 F.2d 252 (3rd Cir. 1982).)

9 Plaintiff’s opposition to the motion to **dismiss** is somewhat perplexing. After acknowledging
 10 that “[c]laims against the United States brought **under** the Federal Tort Claims Act must be presented
 11 to the appropriate Federal agency within two **years after** the claim **accrues**,” (Pl.’s Opp’n (#75) at 2)
 12 it goes on to set forth the standard for **determining the** accrual of claims brought under 42 U.S.C. §
 13 1983. (*Id.* at 2-3.) Plaintiff, apparently **operating under** the mistaken assumption that his claims are
 14 based on § 1983,⁷ argues that under *Heck v. Humphrey*, 512 U.S. 477, 490 (1994), a cause of action
 15 for damages attributable to an unconstitutional **conviction** or sentence does not accrue until the
 16 conviction or sentence has been invalidated. (*Id.*) Plaintiff therefore contends that because the order
 17 releasing him and vacating the parole sentence **was** dated August 27, 2001,⁸ his administrative claim,
 18 filed in July of 2001, was in fact timely. (*Id.* at 3.)

19 In response, the United States points out **that** “this is not an action under § 1983, has never
 20 been an action under § 1983, and can not be **construed** as an action under § 1983.” (Def.’s Reply
 21 (#76) at 2.) The United States further contends **that** “there is no basis to evaluate the accrual of
 22 plaintiff’s FTCA cause of action using principles **applicable** to § 1983 actions.” (*Id.*) Finally, it
 23

24 ⁷In the “Overview” section of the opposition (#75), counsel states that plaintiff filed his complaint based
 25 on 42 U.S.C. §§ 1983 and 1985. (#75 at 2.) While the Second Amended Complaint (#42) does allege a violation
 26 of 42 U.S.C. § 1985(3), there is no mention of a § 1983 claim. Moreover, all defendants other than the United
 States and all claims other than the FTCA claims **have since** been dismissed by stipulation of the parties (#53).

27 ⁸The court order granting plaintiff’s **petition** for writ of habeas corpus and releasing him from
 28 imprisonment was not the August 2001 Order, but the Order dated November 29, 1999. The August 2001 Order
 vacated plaintiff’s special parole term. However, **an administrative** claim filed in July 2001 would still be timely
 based on an accrual date of November 29, 1999, **since** it falls within the two year limitations period.

1 argues that even if § 1983 analysis were to **apply by analogy** to plaintiff's FTCA claims, it would be
 2 inapplicable in this case because the Supreme Court in *Heck* explicitly distinguished claims for false
 3 arrest and false imprisonment. (*Id.* at 3.) According to the government, the plaintiff's FTCA claims,
 4 arising "out of an alleged error in the computation of a parole period," are not "for acts whose
 5 unlawfulness would render the imprisonment **invalid**," and therefore would not require that he first
 6 establish entitlement to release from custody. (*Id.*)

7 While it is true that plaintiff's cause of **action** does not arise under § 1983, and also true that
 8 plaintiff's counsel does not argue for the **application** of § 1983 case law by analogy, a very recent
 9 Ninth Circuit opinion does provide a basis for **evaluating** plaintiff's FTCA claims under § 1983
 10 principles. In *Erlin v. United States*, 364 F.3d 1127 (9th Cir. 2004), a case strikingly similar
 11 factually to the one at bar, the sole issue before the court was "when a cause of action accrue[s] for
 12 purposes of the statute of limitations under the **Federal Tort Claims Act**." *Id.* at 1129. *Erlin*
 13 involved a FTCA action brought by a former **prisoner** for the negligent miscalculation of his release
 14 date. *Id.* The court determined that the interests **identified** by the Supreme Court in *Heck* require
 15 that the same restriction imposed on § 1983 **claims** also be imposed on FTCA claims "that impugn[]
 16 the validity of a conviction or imprisonment." *Id.* at 1132. Accordingly, it held that "a civil action
 17 under the Federal Tort Claims Act for **negligently** calculating a prisoner's release date, or otherwise
 18 wrongfully imprisoning the prisoner, does not **accrue** until the prisoner has established, in a direct or
 19 collateral attack on his imprisonment, that he is **entitled** to release from custody." *Id.* As such,
 20 plaintiff's counsel has supplied the appropriate **standard** to be applied to the statute of limitations in
 21 this case, even if wholly unintentionally.

22 *Erlin* establishes that in an FTCA **action** **impugning** the validity of the underlying conviction
 23 or sentence, the accrual date of the claim is **delayed** until that conviction or sentence has been
 24 successfully challenged. *Id.* Accordingly, the **question** then becomes, whether, in this particular
 25 case, plaintiff is seeking recovery which if **granted** would "render a sentence or conviction invalid."
 26 *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). The United States argues that he is not because (1)

1 plaintiff's claims arise out of an error in the **computation** of his parole period⁹ and not acts whose
 2 unlawfulness would render the imprisonment **invalid**, and (2) because the Supreme Court in *Heck*
 3 explicitly distinguished claims for false arrest **and** false imprisonment. (Def.'s Reply (#76) at 3.)¹⁰
 4 A review of *Erlin* is instructive as to both **arguments**, especially in light of the strikingly similar
 5 factual underpinnings.

6 In *Erlin*, like in this case, the underlying **habeas** petition was granted because the Parole
 7 Commission did not have jurisdiction over Erlin **when** it revoked his parole and sentenced him to an
 8 additional 20 months of imprisonment. *Erlin*, 364 F.3d at 1130. Moreover, Erlin's FTCA claim was
 9 for the negligent miscalculation of his release **date**, which is exactly how plaintiff's remaining claims
 10 in this case can be characterized. The Ninth Circuit determined that "[s]o long as [Erlin] was
 11 incarcerated, a judgment for damages for the **miscalculation** would necessarily imply that he was
 12 wrongfully imprisoned," and that accordingly **his** cause of action did not accrue when the Parole
 13 Commission made the miscalculation, but **rather**, when he "prevail[ed] in a habeas case establishing
 14 that he was entitled to release." *Id.* at 1130. **As such**, the United States' contention that plaintiff's
 15 FTCA claims arise out of "an error in the **computation** of his parole period" (Def.'s Reply (#76) at
 16 3), is of no avail. In fact, when so characterized, **the** act at issue is precisely the type of act whose
 17 unlawfulness would render the imprisonment **invalid**, thereby implicating *Heck* and delaying the
 18 accrual of the claim.

19 The United States' second argument, **that** *Heck* expressly distinguished false arrest and false
 20 imprisonment claims, also is unavailing. **This court** has already determined that it lacks subject
 21 matter jurisdiction over plaintiff's false arrest **and** false imprisonment claims and therefore need not
 22

23 ⁹The Government repeatedly refers to an "**alleged** error" in the computation of plaintiff's parole term.
 24 However, given that plaintiff's petition for writ of **habeas** corpus was granted by the District of Arizona, (Def.'s
 Statement of Undisputed Material Facts (#45), Ex. 12), and the order was not appealed, this will be deemed fact
 rather than allegation.

25 ¹⁰The United States does not make **any** arguments regarding what is essentially plaintiff's second
 26 negligence claim arising out of his arrest and **incarceration** following the granting of his initial habeas petition.
 27 In fact, the government appears to be under the **impression** that the only remaining claim is for false arrest. For
 ease of analysis, the court first will deal with **the** government's arguments regarding the allegedly tortious
 28 conduct resulting in plaintiff's 24 month **imprisonment**, and then will examine whether the procedural
 requirements were satisfied with regard to plaintiff's **second** negligence claim arising out of his two month long
 incarceration.

1 consider the import of this distinction to the **case at bar**. The claims remaining in this action are
2 plaintiff's two negligence claims, and both involve **alleged** negligence in the calculation and
3 application of his parole term. Accordingly, **in light of *Erlin***, plaintiff's first negligence claim
4 arising out of the issuance of a warrant for his **arrest**, his February 19, 1998 arrest, and his 24 month
5 prison sentence, all later determined to have **been without** jurisdiction, accrued on the date his habeas
6 petition was granted—November 29, 1999. **As such**, plaintiff's administrative claim filed in July of
7 2001 was timely, and the government's motion to **dismiss** on statute of limitations grounds is denied
8 as to this claim.

9 Plaintiff's second negligence claim, **arising** out of his arrest for violating the terms of his
10 supervised release following the granting of his **habeas** petition, presents another problem. In a
11 footnote in its reply, the United States notes **that even** were *Heck* to be applied in this instance (as is
12 now required by the Ninth Circuit), it would **produce** an inconsistent result because plaintiff filed his
13 administrative claim in July of 2001, prior to **the accrual** of his claim in August of the same year.
14 While this argument is based on the government's **use** of the incorrect date as applied to plaintiff's
15 first negligence claim, which accrued on **November 29**, 1999, it does signal several difficulties with
16 plaintiff's second negligence claim, which **accrued** in August of 2001—a month after plaintiff filed
17 his administrative claim with the Department of Justice. However, it appears from plaintiff's
18 complaint that his administrative claim **encompassed** only the alleged negligence resulting in his 22
19 months of unlawful incarceration. The **complaint alleges** that plaintiff filed an administrative claim
20 accompanied by "a memorandum outlining **that the** U.S. Parole Commission violated its own rules."
21 (Second Am. Compl. (#42) at 5, ¶ 28.) This **appears** to refer to the U.S.P.C.'s rule stating that it
22 cannot find a special parole violation by a **parolee** during his regular parole term, which it violated
23 when it sentenced plaintiff to 24 months—the **incident** underlying plaintiff's first negligence claim.
24 Because plaintiff did not provide the court with a copy of his administrative claim, and because it
25 appears from his complaint that it only **encompasses** his first negligence claim, his second
26 negligence claim must be dismissed for lack of **subject** matter jurisdiction due to plaintiff's failure to
27 exhaust administrative remedies. **As such**, **this court** need not consider the implications of filing an
28 administrative claim too early.

1 Accordingly, this court has subject **matter** jurisdiction over only plaintiff's first negligence
 2 claim arising out of the events surrounding his **February** 19, 1998 arrest and subsequent
 3 imprisonment.

4 **B. Summary Judgment**

5 **1. Standard on Motion for Summary Judgment**

6 Summary judgment is appropriate **when there** is no genuine issue of material fact and the
 7 moving party is entitled to judgment as a **matter of law**. Fed. R. Civ. P. 56(c). A material issue of
 8 fact is one that affects the outcome of the **litigation** and requires a trial to resolve the differing
 9 versions of the truth. *Lynn v. Sheet Metal Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986);
 10 *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). "[T]here is no issue for trial unless
 11 there is sufficient evidence favoring the **nonmoving** party for a jury to return a verdict for that party.
 12 If the evidence is merely colorable, or is not **significantly** probative, summary judgment may be
 13 granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986) (citations omitted).
 14 Because the burden of demonstrating the **absence** of a genuine issue of material fact lies with the
 15 moving party, the material lodged by the **moving** party must be viewed in the light most favorable to
 16 the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of*
 17 *Los Angeles*, 141 F.3d 1373, 1378 (9th Cir. 1998).

18 The party seeking summary judgment "**always** bears the initial responsibility of informing
 19 the district court of the basis for its motion, **and** identifying those portions of 'the pleadings,
 20 depositions, answers to interrogatories, **and admissions** on file, together with the affidavits, if any,'
 21 which it believes demonstrate the **absence of a genuine** issue of material fact." *Celotex v. Catrett*,
 22 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). "A moving party without the ultimate
 23 burden of persuasion at trial—usually, but **not always**, a defendant—has both the initial burden of
 24 production and the ultimate burden of **persuasion** on a motion for summary judgment." *Nissan Fire*
 25 *& Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). To carry the initial burden of
 26 production, the moving party must either **produce** evidence negating an essential element of the
 27 nonmoving party's claim or defense or show **that the** nonmoving party does not have enough
 28 evidence of an essential element to carry its **ultimate** burden of persuasion at trial. *Id.* However, the

moving party may not simply aver in its legal memoranda that the opposing party “has no evidence to prove his case” or that there are no genuine issues of material fact. *See Celotex*, 477 U.S. at 328 (White, J., concurring). To the extent the moving party fails to satisfy this initial burden of production, summary judgment must be denied. *See Henry v. Gill Industries, Inc.*, 983 F.2d 943, 949-50 (9th Cir.1993). When a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything to survive a motion for summary judgment, even if it would bear the ultimate burden of persuasion at trial. *Nissan Fire & Marine*, 210 F.3d at 1102-03.

“If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense.” *Id.* at 1103. This requires that the nonmoving party “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (footnote omitted). The nonmoving party may not rely on mere allegations in the pleadings and instead must set forth “specific facts showing that there is a genuine issue for trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir.1987) (quotation omitted). At least some “significant probative evidence tending to support the complaint” must be produced. *Id.* (quoting *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000) (“A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact”). “If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment.” *Nissan Fire & Marine*, 210 F.3d at 1103.

2. Application to Defendant’s Motion

The United States’s Motion for Summary Judgment in its entirety consists of a two paragraph recitation of the standard to be applied to motions for summary judgment followed by a single paragraph of “analysis.” That paragraph is as follows:

The undisputed material facts of this case are that Conlon’s incarceration was the result of decisions by the U.S. Parole Commission and a legitimate good-faith legal dispute concerning the computation of his release date. There is no basis for imposition of damages against any these [*sic*] named defendants because the

allegations of negligence, discriminatory intent, intentional denial of civil rights, and conspiracy to deny Conlon's civil rights can not be sustained.

(Mot. for Summ. J. (#44) at 34.) While the government also filed a separate Statement of Undisputed Material Facts (#45) supported by affidavits and other evidence, it does not even attempt to demonstrate to the court how this evidence either negates an essential element of plaintiff's claim, or shows that plaintiff lacks sufficient evidence for his claim. As such, defendant has not satisfied its initial burden as the moving party to identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact." Fed. R. Civ. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Because the government failed to meet this initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, plaintiff was not required to come forward with any additional evidence. See *T.W. Electrical. Serv.*, 809 F.2d, 626 630 (9th Cir. 1987); see also *Abordo v. State of Hawai'i*, 902 F. Supp. 1220, 1225-26 (D. Haw. 1995). Defendant's motion for summary judgment therefore is denied.

III. Conclusion

Accordingly, IT IS ORDERED that defendant's motion to dismiss, or in the alternative for summary judgment (#44/#62) be GRANTED IN PART and DENIED IN PART. It is GRANTED as to plaintiff's negligence claim arising out his second false arrest and two months unlawful imprisonment, and is otherwise DENIED.

IT IS FURTHER ORDERED that all of plaintiff's claims except his first negligence claim arising out of the February 19, 1998 arrest and subsequent imprisonment be DISMISSED for lack of subject matter jurisdiction.

DATED: This 8TH day of June, 2004.


UNITED STATES DISTRICT JUDGE